83-261

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CARSON S. GABLE, JOSEPH S. DADDONA, and THE CITY OF ALLENTOWN,
Petitioners

vs.

ROGER SAMES and DENNIS TROCCOLA,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

When a notice of appeal must be dismissed as a nullity, do *Griggs vs. Provident Consumer Discount Co.*, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (notice of appeal filed during pendency of timely motion under FRCP 52 or 59 is a nullity), and the Federal Rules of Appellate Procedure (Rule 26(b): court of appeals may not enlarge time for filing notice of appeal; Rule 4(a)(5): district court may extend time for filing notice of appeal only upon a showing of excusable neglect or good cause upon motion filed not later than thirty (30) days after expiration of appeal period) permit a court of appeals to invite the appellant to request the district court to vacate and reinstate its judgment to permit appellate review of that judgment?

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS—*Continued*

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PETITION FOR WRIT OF CERTIORARI

Petitioners Carson S. Gable, Joseph S. Daddona and The City of Allentown, defendants in the District Court and appellees in the Court of Appeals[1] respectfully petition this Honorable Court to issue a writ of certiorari to the United States Court of Appeals for the Third Circuit for review and vacatur of that portion of the judgment, entered by the Court of Appeals in the matter captioned as *SAMES Roger; TROCCOLA, Dennis, Appellants vs. GABLE, Carson S.; DADDONA, Joseph S.; CITY OF ALLENTOWN*, and docketed in the Court of Appeals at No. 82-1456, which permits respondents Roger Sames and Dennis Troccola, plaintiffs in the District Court, to move

1. The only other parties in the lower courts were respondents Roger Sames and Dennis Troccola.

the District Court to vacate and re-enter judgment so as to allow respondents to appeal from the re-entered judgment.

OPINIONS BELOW

The text of the opinion of the District Court is set forth as Appendix F to this petition. The opinion of the District Court has been published, *Sames vs. Gable*, 542 F.Supp. 51 (E.D.Pa. 1982). The text of the opinion of the Court of Appeals is set forth as Appendix B to this petition. The opinion of the Court of Appeals was marked by the court "NOT FOR PUBLICATION" and has not been published.

GROUNDS FOR JURISDICTION

The judgment of the Court of Appeals was filed on June 15, 1983. The text of that judgment is set forth as Appendix A to this petition. Petitioners timely filed a petition for rehearing with the Court of Appeals, which denied that petition on July 14, 1983. The text of the order of the Court of Appeals sur rehearing is set forth as Appendix C to this petition. Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Honorable Court by 28 U.S.C. Section 1254(1).

STATUTES AND RULES

Rule 4(a) of the Federal Rules of Appellate Procedure states:

> (a) Appeals in Civil Cases:
>
> (1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of entry of the judgment or order appealed from, but if the United States or an officer or agency thereof is a party the notice of appeal may be filed by any party within 60 days after such entry.

If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a) (4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time pre-

scribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extention shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

Rule 26(b) of the Federal Rules of Civil Procedure states:

(b) Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act or may permit an act to be done after the expiration of such time but the court may not enlarge the time for filing a notice of appeal a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend modify, enforce or otherwise review, or a notice of appeal from an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

Rule 60(b) of the Federal Rules of Appellate Procedure states:

(b) Mistakes, Inadvertence, Excusable Neglect, Newly Discovered Evidence, Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or ex-

cusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application, or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. Section 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

STATEMENT OF THE CASE

Respondents commenced this civil action to obtain relief for alleged deprivations of their civil rights by petitioners. Respondents claimed that their demotions by petitioners from the rank of police sergeant to the rank of patrolmen without a hearing violated their property rights to their sergeant stripes and their First Amendment rights because their demotions were motivated only by retaliation for their support of petitioner Daddona's mayoralty opponent. Petitioners asserted, and the District Court found, that the demotions could be effected under controlling state law without a hearing, and that the demotions were not politically motivated but necessitated by the respondents' other conduct which was disruptive to the morale of the police department. Subject matter jurisdiction of the District Court for these civil rights claims was predicated upon 28 U.S.C. Section 1343. Respondents also appended various state claims.

By way of a judgment, an order and an opinion entered June 25, 1982[2] the District Court disposed of the matter by granting petitioners' motion to dismiss and motion for summary judgment which respondents had contested on the merits. The District Court dismissed all of respondents' claims predicated upon an alleged unconstitutional taking of property, entered judgment in favor of petitioners and against respondents with respect to all of respondents' claims predicated upon an alleged political firing, and dismissed respondents' pendent state claims without prejudice.

On July 6, 1982, respondents served petitioners with a motion for reconsideration, which was filed in the District Court on July 8, 1982. While that motion was pending, respondents filed a notice of appeal on July 23,

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2. The text of the District Court's judgment is set forth as Appendix D to this petition. The text of the District Court's order is set forth as Appendix E to this petition. The text of the District Court's opinion is set forth as Appendix F to this petition.

1982. On September 17, 1982, the District Court denied respondents' motion for reconsideration. Respondents filed no further notice of appeal.

On June 15, 1983, the Court of Appeals dismissed respondents' appeal without prejudice to their moving the District Court under Federal Rule of Civil Procedure 60(b) to vacate and re-enter judgment so as to allow respondents to appeal from the re-entered judgment.[3] Rejecting respondents' contentions that their motion for reconsideration was not a motion within the scope of F.R.A.P. 4(a)(4), that their motion was not timely, and that *Griggs vs. Provident Consumer Discount Co.*, 103 S.Ct. 400 (1982), was inapplicable, the Court of Appeals held that respondents' notice of appeal was a nullity. The Court of Appeals declined to consider "whether this case involves 'unique circumstances' such as those recognized by the Supreme Court in *Thompson vs. INS*, 375 U.S. 384 (1964)(per curiam)", and held, without citation of authority or discussion, that "In the past, however, this Court has allowed appellants in similar circumstances to move the District Court under Fed. R.Civ.P. 60(b) to vacate and re-enter judgment so as to allow appellants to appeal from the re-entered judgment. We believe that that procedure provides a fair result for both parties in this case as well" (Opinion of the Court, A-5 & A-6, infra.). On July 25, 1983, the Court of Appeals denied petitioners' timely petition for rehearing.[4] In their petition for rehearing, petitioners contended that the Court of Appeals should not have permitted respondents to proceed as delineated by that Court.

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3. The text of the judgment of the Court of Appeals is set forth as Appendix A to this petition. The text of the opinion of the Court of Appeals is set forth as Appendix B to this petition.

4. The text of the court of appeals order sur rehearing is set forth as Appendix C to this petition.

ARGUMENT

The decision below should be reviewed because it seriously hampers proper and uniform administration of the rules of procedure governing litigation in the federal courts. The decision of the Court of Appeals conflicts with and departs from decisions rendered by this Honorable Court, other decisions rendered by the Court of Appeals, and decisions rendered by other Courts of Appeal:

At the times material to respondents' appeal, F.R.A.P. 4(a)(4) stated:

> "If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing"

In *Griggs vs. Provident Consumer Discount Co.*, 680 F.2d 927, 929 n.2 (3d. Cir., 1982), the Court of Appeals below held that, although a notice of appeal was subject to dismissal under Rule 4(a)(4) when it was filed during the pendency of a timely Rule 59 motion, appellants could proceed unless appellees could show prejudice resulting from the premature filing of the notice of appeal. In *Griggs vs. Provident Consumer Discount Co.*, 103 S.Ct. 400 (1982), this Honorable Court granted a petition for writ of certiorari and vacated the judgment of the Court of Appeals. Noting that Rule 26(b) of the Federal Rules of Appellate Procedure explicity prohibits

Courts of Appeals from enlarging the time for filing a notice of appeal, 103 S.Ct. at 403, 404, n.3, this Honorable Court held that a Court of Appeals had no discretion to waive conceded defects in a premature notice of appeal, and that;

> ". . . The notice of appeal filed in this case on November 19, 1980, was not merely defective, it was a nullity. Under the plain language of [Rule 4(a)(4)], a premature notice of appeal 'shall have no effect' a new notice of appeal 'must be filed'. In short, it is as if no notice of appeal were filed at all. And if no notice of appeal is filed at all, the Court of Appeals lacks jurisdiction to act. It is well settled that the requirement of a timely notice of appeal is 'mandatory and jurisdictional' ". 103 S.Ct. at 403

On remand from this Honorable Court, the Court of Appeals dismissed the appeal in *Griggs* for lack of appellate jurisdiction, *Griggs vs. Provident Consumer Discount Co.*, 699 F.2d 642 (3d Cir., 1983). The Court there did not permit the appellant the further relief offered here. *Accord, Behring International, Inc. vs. Imperial Iranian Air Force*, 699 F.2d 657, 665-666 (3d Cir., 1983). Similarly, in *de la Fuente vs. Central Electric Cooperative, Inc.*, 703 F.2d 63 (3d Cir., 1983), the Court of Appeals dismissed an appeal because appellant's motion for a new trial was not timely. Even though the district court in that case had entertained the untimely motion and the appellant filed a notice of appeal eight days after the motion was denied, the Court of Appeals did not afford that appellant the relief extended here, and found no "unique circumstances", 703 F.2d at 65, n.4.

The decision of the Court of Appeals in this case, to the extent that it permits further relief in spite of an invalid appeal, conflicts not only with its decisions in *Griggs*, *Behring* and *de la Fuente*, *supra*, but also with decisions rendered by the Courts of Appeal for the Fifth, Tenth, and Eleventh Circuits. In *Beam vs. Youens*, 664 F.2d 1275 (5th Cir., 1982), appellant filed a notice of ap-

peal before resolution of appellant's motion for a new trial, and the Court of Appeals dismissed the appeal without affording appellant the further relief extended to respondents in this case. The same results were reached by the Tenth Circuit in *Century Laminating, Ltd. vs. Montgomery*, 595 F.2d 563 (10th Cir., 1979), and by the Eleventh Circuit in *Gibbs vs. Maxwell House, Div. of Gen. Foods Corp.*, 701 F.2d 145 (11th Cir., 1983), *accord, Florida Women's Med. Clinic, Inc. vs. Smith*, 706 F.2d 1172 (11th Cir., 1983).

The decision of the Court of Appeals in this case effectively enlarges by indirection respondents' time for appeal. As such, the decision directly conflicts with Rule 26(b) of the Federal Rules of Appellate Procedure, which explicitly states that a court of appeals may not enlarge the time for filing a notice of appeal. In *United States vs. Robinson*, 361 U.S. 220, 80 S.Ct. 282 (1960), this Honorable Court held, in construing a predecessor to Rule 26(b), that enlargement of the time for appeal is prohibited even when excusable neglect may be found. More recently, in *Williams vs. Bolger*, 633 F.2d 410 (5th Cir., 1980), the Fifth Circuit suggested that the 1979 revisions to the Federal Rules of Appellate Procedure "ended the possibility of an equitable excuse . . . from the ban on premature filings", 633 F.2d at 412-413 n.2. In the instant case, however, the Court of Appeals declined to resolve whether "unique circumstances" obtained, but permitted respondents further relief.

In the absence of "unique circumstances", and in light of the appellate rules' prohibition forbidding the court to "enlarge the time for filing a notice of appeal", F.R.A.P. 26(b), this Honorable Court's pronouncements in *Griggs* and the actions taken by the court of appeals in *Griggs*, *Behring* and *de la Fuente* call into question the validity of the remand procedure delineated in the Court of Appeals' opinion and judgment in this case.

F.R.C.P. 60(b), which the Court of Appeals called to respondents attention states:

"On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; and (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not effect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. Section 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by a motion as prescribed in these rules or by an independent action".

Of additional interest is F.R.A.P. 4(a)(5), which states:

"The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the prescribed

> time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later"

Petitioners respectfully suggest that where no "unique circumstances" obtain, as is the situation in this case, no relief may be had under F.R.C.P. 60(b) or F.R.A.P. 4(a)(5), even if the required motions under these rules could be made in time.

In *Perrin vs. Aluminum Co. of America*, 197 F.2d 254 (9 Cir., 1952), and in *Wagner vs. United States*, 316 F.2d 871 (2 Cir., 1963), appellants who had earlier failed to perfect valid appeals were not permitted to use Rule 60(b) to obtain review or to extend the time for appeal. As noted by the Court in *Perrin*, 197 F.2d at 255.

> ". . . Rule 60(b) was not intended to be resorted to as an alternative to review by appeal, nor as a means of enlarging by indirection the time for appeal except in compelling circumstances where justice requires that course. *Cf. Hill vs. Hawes*, 320 U.S. 520, 64 S.Ct. 334, 88 L.Ed. 283. Appellants had opportunity to obtain appellate review of the very rulings of which they now complain but failed to take advantage of the opportunity within the time prescribed by Rule 73(a). Having in consequence of their own lack of diligence been turned away at the front door they now seek entry at the rear. Certainly Rule 60(b) was not designed to afford machinery whereby an aggrieved party may circumvent the policy evidenced by the rule limiting the time for appeal. . . ."

In the same vein, Professor Moore's analysis of Rule 60(b) has noted.

7 *Moore's Federal Practice* ¶ 60 27[1]:

> "Like 60(b) generally, clause (6) cannot be used as a substitute for appeal. Absent exceptional and compelling circumstances, a party will not be granted relief from a judgment under clause (6); even though relief from the judgment might have been obtained had an appeal been taken, where an appeal was taken but was dismissed because not perfected, or because it was untimely. . . ."

and that, *Id.*, ¶60.27[2]

> ". . . Any view that mere error of law is a basis for relief under Rule 60(b)(6) would be in the teeth of Rule 4(a) of the Appellate Rules, since it would result simply in the vacation and reinstatement of the judgment, thus extending the rigid limits on time for appeal. It may be argued, therefore, that a motion that does not put forth grounds for 'relief from the operation of the judgment' as distinct from relief from the strictures upon time for appeal 'does not fall within Rule 60(b)(6)' ".

The Court of Appeals may not extend the time for filing a notice of appeal, F.R.A.P. 26(b), and that time has long since run from the District Court's September 17, 1982 order. The District Court was empowered to extend the time for thirty days under F.R.A.P. 4(a)(5), but because respondents did not act within the time required, the District Court has lost its power to extend the appeal period. *Wyzik vs. Employee Benefit Plan of Crane Co.*, 663 F.2d 348 (1 Cir. 1981); *Briggs vs. Lucas*, 678 F.2d 612 (5 Cir 1982). Because of the strictures placed by these rules, it would be most inappropriate for the lower courts to attempt to accomplish by indirect means that which cannot be done by direct means within the rules. *see, e.g. Hensley vs. Chesapeake & Ohio Ry. Co.*, 651 F.2d 226 (4 Cir., 1981) (in light of rule, courts without power to vacate and reinstate where failure to receive notice is sole ground for relief); *accord, Wilson vs.*

Atwood Group, 702 F.2d 77 (5 Cir., 1983). In addition, with respect to time, Rule 60(b) mandates that "The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken ', and more than one year has passed since the District Court's June 25, 1982, order was entered.

The Court of Appeals in the past has recognized that Rule 60(b) is not a substitute for an appeal, and that it provides extraordinary relief which may be granted only upon a showing of exceptional circumstances, *Vecchione vs. Wohlgemuth*, 558 F.2d 150, 159 (3 Cir 1977); *Mayberry vs Maroney*, 558 F.2d 1159, 1163 (3 Cir. 1977); *John E. Smith Sons Co. vs. Lattimer Foundry & Machine Co.*, 239 F.2d 815 (3 Cir., 1956); *Accord, Horace vs. St. Louis Southwestern R. Co.*, 489 F.2d 632, 633 (8 Cir., 1974); *Taylor vs. United States*, 642 F.2d 1118 (8 Cir., 1981). Legal error, inconsistency, and inflexibility are not grounds for Rule 60(b) relief in the Third Circuit *Martinez-McBean vs. Government of Virgin Islands*, 562 F.2d 908 (3 Cir., 1977) and elsewhere, *Alvestad vs. Monsanto Co.*, 671 F.2d 908 (5 Cir 1982).

A court should not attempt to grant relief from dismissal on the ground that counsel's conduct imposes a penalty upon the client *Link vs. Wabash R.*, 370 U.S. 626, 633-34 82 S.Ct. 1386, 1390 (1962). Usually, as in this case, neither ignorance nor carelessness on the part of counsel, and neither inadvertence or mistake on the part of counsel or his staff do not constitute excusable neglect or grounds for Rule 60(b) relief, *e.g.*, *State of Oregon vs. Champion International Co.*, 680 F.2d 1300 (9 Cir. 1982) (addressing notice of appeal to state court); *United States vs. Thompson*, 438 F.2d 254, 257 (8 Cir., 1971) (failure to bring statute to court's attention); *Nugent vs. Yellow Cab Co.*, 295 F.2d 794 (7 Cir 1961) (mutually mistaken ignorance and agreement for unauthorized extension of time).

Turning momentarily to the subdivisions of Rule 60(b), one may perceive additional difficulties with the

course charted by the lower court's June 15, 1983 opinion and judgment, beyond the jurisdictional and time problems already noted, Subdivision (2) ["newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)"] does not obtain because respondents contested petitioners' motions on the merits, and because respondents' later motion for reconsideration cited evidence which respondents admitted was available to them before the District Court granted petitioners' motions. Subdivisions (3), (4), and (5) do not obtain under the purported "unique circumstances" delineated by respondents in their supplemental briefs to the Court of Appeals. Those briefs do not mention and do not allude to fraud, misrepresentation or other misconduct of defendants to a void judgment or to the destruction of a judgment based upon which the judgment of the District Court was based. Subdivisions (1) and (6) are mutually exclusive *Corex Corp. vs. United States*, 638 F.2d 119, 121 (9 Cir., 1981), but the "unique circumstances" advanced by respondents fall short of satisfying the strict, extraordinary circumstances contemplated by the Rules.

Respondents have contended that their predicament was caused by the District Court's statement in its September 17 order that it no longer had jurisdiction because of respondents' July 23 notice of appeal, and by respondents' thought that their motion for reconsideration was neither timely under Rule 59 nor a motion under F.R.C.P. 59 and F.R.A.P. 4(a)(4). The District Court never opined on the validity of respondents' notice of appeal, a subject specifically addressed by F.R.A.P. 4(a)(4). The District Court never opined on the nature or timeliness of respondents' July 6 motion. The District Court never invited respondents to file a notice of appeal before decision was made on their motion for reconsideration, and the District Court never stated that respondents could relax the viligence and to forebear from the action specifically required by F.R.A.P. 4(a)(4). In sum,

the circumstances cited by respondents below do not "put forth grounds for 'relief from the operation of the judgment,' as distinct from relief from the strictures upon time for appeal" 7 *Moore's Federal Practice* ¶60 27[2]. Respondents should not be afforeded the further relief permitted by the Court of Appeals.

CONCLUSION

The opinion and judgment of the Court of Appeals present serious questions of public importance regarding the meaning and viability of the rules and decisions pertaining to proper and timely appellate practice. The course mapped by the opinion and judgment differs greatly from and are contrary to the results reached in identical or substantially similar cases and finds no cited precedent, either stated in the opinion or disclosed by counsel's research into the prior reported decisions of the Court of Appeals. The course charted by the opinion and judgment of the lower court attempts to do indirectly what cannot be done directly. For these reasons, therefore, petitioners respectfully file this petition for certiorari.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1456

SAMES, ROGER; TROCCOLA, DENNIS,
Appellants

v.

GABLE, CARSON S.; DADDONA, JOSEPH S.;
CITY OF ALLENTOWN

(D.C. Civ. No. 82-1237)
On Appeal from the United States District Court
for the Eastern District of Pennsylvania

Present: HUNTER, HIGGINBOTHAM, *Circuit Judges*
and GERRY, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel April 11, 1983.

On consideration whereof, it is now here ordered and adjudged by this Court that the within appeal be, and the same is hereby dismissed without prejudice to the filing of an appropriate Rule 60(b), motion in the district court. It is further ordered and adjudged that if the

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* Honorable John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

new judgment is entered and a valid notice of appeal is filed, the parties may rely on the same briefs except to the extent that they may wish to make changes and the Clerk of this Court will expedite any such appeal. Costs taxed against appellants.

ATTEST:

Clerk

June 15, 1983

APPENDIX B
NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1456

SAMES, ROGER; TROCCOLA, DENNIS
Appellants

v.

GABLE, CARSON S.; DADDONA, JOSEPH S.;
CITY OF ALLENTOWN

Appeal From the United States District Court
For the Eastern District of Pennsylvania
D.C. Civil No. 82-1237

Argued April 11, 1983

Before: HUNTER, HIGGINBOTHAM, *Circuit Judges*, and GERRY,* *District Judge*

Opinion filed June 15, 1983

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*Hon. John F. Gerry, United States District Judge for the District of New Jersey, sitting by designation.

OPINION OF THE COURT

PER CURIAM:

1. Plaintiffs/appellants Roger W. Sames and Dennis J. Troccola appeal from an order of the United States District Court for the Eastern District of Pennsylvania dismissing a portion of their claims and granting summary judgment on the remainder of their claims. We cannot reach the merits of this appeal because appellants' notice of appeal is invalid.[1]

2. On June 25, 1982, the district court filed an order granting defendants' motion to dismiss and their motion for summary judgment. On July 6 appellants served a motion for reconsideration which was filed in the district court on July 8. Thereafter, on July 23 they filed their notice of appeal. On September 17 the district court denied appellants' motion for reconsideration.

3. Fed. R. App. P. 4(a)(4) provides in pertinent part as follows:

> If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required, if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect.

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1. We are obligated to resolve questions concerning our jurisdiction even when the parties do not raise them. *See Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 102 S. Ct. 2099, 2104 (1982); *de la Fuente v. Central Elec. Coop.*, 703 F.2d 63, 64 n.1 (3d Cir. 1983).

In *Griggs v. Provident Consumer Discount Co.*, 103 S. Ct. 400 (1982) (per curiam), the Supreme Court made it clear that Rule 4(a)(4) must be read literally and that a premature notice of appeal "is as if no notice of appeal were filed at all." *Id.* at 403. If no notice of appeal is filed, the court of appeals lacks jurisdiction to act. *Id.* In *de la Fuente v. Central Electric Cooperative, Inc.*, 703 F.2d 63 (3d Cir. 1983) (per curiam), we noted that in order for Rule 4(a)(4) to apply, the motion filed in the district court must be one of the motions listed in the rule, and the motion must be timely. *Id.* at 64-65.

4. In this case appellants' motion for reconsideration is properly treated as a Fed. R. Civ. P. 59(e) motion to alter or amend the judgment. *Richerson v. Jones*, 572 F.2d 89, 93 (3d Cir. 1978); *Gainey v. Brotherhood of Railway and Steamship Clerks*, 303 F.2d 716, 718 (3d Cir. 1962). It is therefore one of the motions to which Rule 4(a)(4) applies. Furthermore, appellants' Rule 59(e) motion was timely when served on July 6.[2]

5. Because appellants filed their notice of appeal while their timely Rule 59(e) motion was pending in the district court, their notice of appeal is a "nullity." *Griggs*, 103 S. Ct. at 403. In the past, however, this

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2. Fed. R. Civ. P. 59(e) states that a motion to alter or amend a judgment shall be *served* not later than 10 days after entry of judgment. *See Sonnenblick-Goldman Corp. v. Nowalk*, 420 F.2d 858, 859-61 (3d Cir. 1970); 9 J. Moore, B. Ward, & J. Lucas, Moore's Federal Practice ¶ 204.12 [2] (2d ed. 1983) (10-day limit measured from time of service rather than from time of formal filing).

In this case the district court entered judgment on June 25, 1982. The tenth day after entry of judgment was Monday, July 5. Because Independence Day fell on Sunday in 1982, we take judicial notice of the fact that Monday, July 5 was a legal holiday. *See generally* Exec. Order No. 11,582, 3 C.F.R., 1971-75 Comp. at 539-41, *reprinted in* 5 U.S.C. §6103 app. at 561 (1976). Fed. R. Civ. P. 6(a) indicates that in computing a limitations period, the last day in the period shall not be counted if it is a legal holiday. Thus appellants' Rule 59(e) motion was timely when served on July 6.

Court has allowed appellants in similar circumstances to move the district court under Fed. R. Civ. P. 60(b) to vacate and re-enter judgment so as to allow appellants to appeal from the re-entered judgment. We believe that that procedure provides a fair result for both parties in this case as well.[3]

6. Accordingly we will dismiss the appeal without prejudice to the filing of an appropriate Rule 60(b) motion in the district court. If the new judgment is entered and a valid notice of appeal is filed, the parties may rely on the same briefs except to the extent that they may wish to make changes. The clerk of the court of appeals will expedite any such appeal.

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3. We therefore will not consider whether this case involves "unique circumstances" such as those recognized by the Supreme Court in *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1456

SAMES, ROGER; TROCCOLA, DENNIS,
Appellants

v.

GABLE, CARSON S.; DADDONA, JOSEPH S.;
CITY OF ALLENTOWN

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, *Circuit Judges*

The petition for rehearing filed by

APPELLEES

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ James Hunter, III
Judge

Dated: July 14, 1983

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

	:	Civil Action
ROGER SAMES DENNIS TROCCOLA	:	
v.	:	
CARSON S. GABLE	:	
JOSEPH S. DADDONA City of Allentown	:	No. 82-1237

CIVIL JUDGMENT

Before the Honorable E. MacTroutman

AND NOW, this 23rd day of June 1982, in accordance with the Court's Memorandum and Order of this date,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of defendants and against plaintiffs with repect to all claims predicated upon a political firing.

Entered: 6/25/82
Clerk of Court

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROGER SAMES DENNIS TROCCOLA	:	
v.	:	Civil Action No. 82-1237
CARSON S. GABLE JOSEPH S. DADDONA City of Allentown	:	

ORDER

TROUTMAN, J.

AND NOW, this 23rd day of June , 1982, IT IS ORDERED that defendants' motion to dismiss all claims predicated upon an unconstitutional taking of property is GRANTED. IT IS FURTHER ORDERED that defendants' motion for summary judgment on all claims predicated upon a political firing is GRANTED.

IT IS FURTHER ORDERED that plaintiffs' pendent claims are DISMISSED without prejudice.

_____
J.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROGER SAMES DENNIS TROCCOLA	:	
v.	:	Civil Action No. 82-1237
CARSON S. GABLE JOSEPH S. DADDONA City of Allentown	:	

MEMORANDUM AND ORDER

TROUTMAN, J. JUNE 23, 1982

Complaining that they were unconstitutionally demoted from sergeant to patrolmen because of their support of an unsuccessful candidate for mayor, plaintiffs instituted suit against defendants, City of Allentown (City), Police Chief Gable and Mayor Daddona. Specifically, plaintiffs, former sergeants on the Allentown police force, contend that their demotion without a hearing to determine "just cause" amounted to a "taking" of property without due process. Moreover, since the asserted motivation for the demotion was the support of a political candidate, plaintiffs argue that their First Amendment rights were violated. *Branti v. Finkel*, 445 U.S. 507 (1980); *Elrod v. Burns*, 427 U.S. 347 (1976). Relief is sought pursuant to the Civil Rights Act of 1871, 42 U.S.C. §1983 and §1985(3). Plaintiffs have also appended various state claims.

Defendants initially moved to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). While that motion was still pending, they filed an appropriately supported motion for summary judgment. Upon consideration of both mo-

tions, we grant the motion to dismiss all claims based upon an unconstitutional "taking" and enter judgment upon plaintiffs' allegations of a political firing.

In order to withstand defendants' motion for summary judgment, plaintiffs may not rest upon the mere allegation of their complaint. Rather, they must respond by affidavit or otherwise and adduce *specific facts* showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). *See Ness v. Marshall*, 660 F. 2d 517, 519 (3d Cir. 1981); Advisory Committee's Notes on 1963 Amendment to Rule 56(e). Ignoring this command, plaintiffs have failed to point to any *specific facts* which show that there is a genuine issue for trial on the issue of a politically motivated firing. In their depositions, defendants Gable and Daddona denied any political motivation in the decision to demote plaintiffs. In fact, both defendants testified that they believed that plaintiffs were involved in threatening and spying upon and fighting with other city police officers. Hence, they demoted them in an effort to improve morale. The establishment of these uncontroverted facts as to defendants' motives, warrants entry of judgment on the issue of a politically motivated firing.

We turn now to plaintiffs' claim that their demotion was a "taking" of their property without due process. Our inquiry regarding whether a police sergeant's rank is considered constitutionally protected "property" revolves around state law, for it, rather than federal law, creates and defines the contours of "property rights". *Board of Regents v. Roth*, 408 U.S. 564 (1972). A claim of entitlement is decided by reference to state law. *Bishop v. Wood*, 426 U.S. 341 (1976); *Kelly v. Warminister Township Board of Supervisors*, 512 F. Supp. 658, 600, n.2 (E.D. Pa. 1981); *Skrocki v. Caltabiano*, 505 F. Supp. 916, 918 (E.D. Pa. 1981). We must determine whether Pennsylvania considers sergeant's stripes, issued by a third-class city, to be "property" which can only be taken away by a process which is legally due.

Petrillo v. City of Farrella, 345 Pa. 518, 520-21 (1942) held that state civil service requirements only protect a police officer's status as patrolman. A demotion without a hearing is permissible since civil service rights and protections attach only to the position of police force member. Ten years later, in *Zebyle v. Bettor*, 371 Pa. 546, 549 (1952), the Pennsylvania Supreme Court, in a *quo warranto* action, held that a third-class city may demote a policeman without a hearing so long as the officer remains a member of the force. Significantly, defendant Allentown is a third-class city.

Plaintiffs' reliance upon *George v. Moore*, 394 Pa. 419 (1959) and *Oswald v. City of Allentown*, 388 A. 2d 1128 (1978), cases which considered due process rights of fired and not demoted police officers is misplaced. *George v. Moore*, 394 Pa. at 421, held that a hearing is required in order to lawfully fire a police officer. Likewise, the issue before the Commonwealth Court in *Oswald, supra*, was whether defendant had permissibly terminated plaintiff police officer after according him a due process hearing. Neither *George* nor *Oswald* support the proposition that a third-class city must convene a hearing before demoting a police officer; rather, they hold that such a hearing is required before a permissible termination occurs.

Plaintiffs' reliance upon 53 P.S.C.A. §53251 which generally regulates municipal-police relationships and 53 P.S.C.A. §53270 which specifically prohibits demotions for "political reasons" is likewise erroneous. These statutes on their face apply only to "incorporated towns" and do not regulate third-class cities.

> 53 P.S.C.A. §37001 provides in relevant part that no member of the city police force . . . shall be demoted in rank . . . except upon proper cause shown . . .

Plaintiffs argue that this statute evidences the fact that Pennsylvania considers sergeant stripes to be "property"

which can only be taken away after a hearing to determine "proper cause". We disagree.

Sweeny v. Johns, 380 A. 2d 504 (1977) relying upon 53 P.S. §37002, the very next statutory sub-section, held that a third-class city's mayor may properly demote the police chief and "other officers without cause, and without a hearing or other civil service protection". *Id.* This is because third-class cities which have adopted the optional charter form of government, as has defendant Allentown, can supersede statewide statutes which govern "personnel and administration" policies. *Greenberg v. Bradford*, 432 Pa. 611, 614 (1968).

Because we conclude that Pennsylvania does not consider the position of police sergeant in a third-class city with an optional charter form of government to be a property right, we will grant defendants' motion to dismiss all federal claims based upon the "taking" thereof.

In view of our holding, we also dismiss plaintiffs' pendent claims. Pendent jurisdiction is discretionary, *Lentino v. Fringe Employee Plans, Inc.*, 611 F. 2d 474, 478 (3d Cir. 1979), and plaintiffs may claim no right thereto. *Wire Mesh Products, Inc. v. Wire Belting Association*, 520 F. Supp. 1005 (E.D. Pa. 1981).

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROGER SAMES DENNIS TROCCOLA	:	
v.	:	Civil Action
CARSON S. GABLE	:	No. 82-1237
JOSEPH S. DADDONA City of Allentown	:	

ORDER

TROUTMAN, J.

AND NOW, this 15th day of September, 1982, upon consideration of plaintiff's motion for reconsideration and defendants' response thereto, IT IS ORDERED that the motion is DENIED.[1]

J.

1. Numerous factors compel this conclusion. On July 22, 1982, plaintiff filed a notice of appeal which divested this Court of jurisdiction to consider the instant motion. This rule enjoys a long history of acceptance, *Hovey v. McDonald*, 109 U.S. 150, 157 (1883), and remains undiluted by the passage of time. *Plant Economy, Inc. v. Mirror Insulation Co.*, 308 F. 2d 275, 276-77 (3d Cir. 1982). Indeed, the Third Circuit considers the rule "well settled". *Securities & Exchange Comm'n. v. Investors Security Corp.*, 560 F. 2d 561, 568 (3d Cir. 1977). However, because we retain "limited authority to . . . assist the Court of Appeals . . . in its determination" of the issues on appeal, *id*, we briefly address the issues raised by plaintiff's motion.

Plaintiffs' reliance upon their verified complaint in lieu of affidavits when they originally opposed defendants' motion is misplaced. True, *Ratner v. Young*, 465 F. Supp. 386, 389, n. 5 (D. V.I. 1979), held that reliance upon a verified complaint can be equated

with reliance upon a properly filed affidavit. Fed. R. Civ. P. 56(e) requires that affidavits be made upon "personal knowledge" and set forth "facts as would be admissible in evidence". *See, First National Bank Co. v. Insurance Co. of North America*, 606 F. 2d 760, 766 (7th Cir. 1976); *Kohr v. Johns-Manville*, 534 F. Supp. 256, 258 (E.D. Pa. 1982); *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 513 F. Supp. 1100, 1118 (E.D. Pa. 1981).

In the case at bar, the verification appended to plaintiffs' complaint states that the facts alleged are true "to the best of [plaintiff's] knowledge, information and belief". Moreover, the affidavits submitted in support of plaintiffs' motion to reconsider contain hearsay and other inadmissible, irrelevant statements. *Wire Mesh Products, Inc. v. Wire Betting Ass'n.*, 520 F. Supp. 1004, 1006, n. 17 (E.D. Pa. 1981); *Sims v. Mack Truck Corp.* 483 F. Supp. 592, 602 (E.D. Pa. 1980). In fact, we recently elaborated upon the standard which a Rule 56 affidavit must meet. That discussion, set forth below, applied with equal force to a verified complaint which is relied upon in opposition to a motion for summary judgment.

> Rule 56 requires that
>
> > affidavits must be made upon personal knowledge, *Williams v. Evangelical Retirement Homes*, 594 F. 2d 701, 703 (8th Cir. 1979), devoid of hearsay, conclusory language and statements which purport to examine thoughts as well as actions. *Maiorana v. MacDonald*, 596 F. 2d 1072, 1080 (1st Cir. 1979). Affidavits speculating as to motivations but containing no factual support do not conform to the rule, *Gatling v. Atlantic Richfield Co.*, 577 F. 2d 185, 188 (2d Cir.), *cert. denied*, 439 U.S. 861, 99 S. Ct. 181, 58 L. Ed. 2d 169 (1978), and statements prefaced by the phrases, "I believe" or "upon information and belief" or those made upon an "understanding", *Cermetek, Inc. v. Butler Arpak, Inc.*, 573 F. 2d 1370, 1377 (9th Cir. 1978), are properly subject to a motion to strike. Moreover, affidavits which contain conclusions of law, ultimate facts, assertions, arguments and inferences derived from the opposing party's affidavits similarly may be "disregarded". *Cohen v. Ayers*, 449 F. Supp. 298, 321 (E.D. Ill. 1978), *aff'd mem.*, 596 F. 2d 733 (7th Cir. 1979).

Carey v. Beans, 500 F. Supp. 580, 583 (E.D. Pa. 1980), *aff'd*, 659 F. 2d 1065 (3d Cir. 1981).

Plaintiffs also assail this Court's decision as being premature in that discovery was still outstanding when we ruled upon the motions. We have again studied plaintiffs' opposition to defendants' motion for summary judgment (Document 25) and are unable to

NOTE — (*Continued*)

find any indication contained therein that discovery was, at that time, incomplete. In fact, plaintiffs' "Counterstatement of The Facts" states the status of discovery but fails to even hint that an inadequate factual record precludes summary judgment.

We now address plaintiffs' contention that summary judgment was improperly entered because we failed to permit counsel to argue the motion. Specifically, they assert that they lacked "notice" that we would rule on the motion. This argument lacks merit. The "notice" provisions of Fed. R. Civ. P. 56 were more than adequately met in that plaintiffs had "prior knowledge that the court was considering . . . summary judgment". *Bryson v. Braud Insulations, Inc.*, 621 F. 2d 556, 559 (3d Cir. 1980). Proof of this fact is clear from the record. Plaintiffs' opposition to defendants' motion was even captioned "Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment". *See*, Document 25. Hence, plaintiffs cannot argue now that they had no notice of the fact that a Rule 56 motion was pending. Additionally, whether oral argument on any particular motion is warranted is committed to the Court's sound discretion. *See*, E. D. Pa. Local R. Civ. P. 20(f).

Finally, plaintiffs argue that we misread Pennsylvania case and statutory law in deciding that plaintiffs' sergeant stripes were not "property". We disagree with them for the reasons set forth in our memorandum of June 23, 1982.

No. 83-261

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CARSON S. GABLE, JOSEPH S. DADDONA, and THE CITY OF ALLENTOWN,
Petitioners

v.

ROGER SAMES and DENNIS TROCCOLA,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR CERTIORARI

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TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (*Continued*)

TABLE OF STATUTES AND RULES

UNITED STATES SUPREME COURT RULE 17.1

Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

FEDERAL RULE OF CIVIL PROCEDURE 60(b)

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or ex-

cusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application, or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time and for reasons (1) (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28 U.S.C. Section 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF PENNSYLVANIA RULE 20(g)

(g) Motions for reconsideration or reargument shall be served within ten (10) days after the entry of the judgment, order, or decree concerned.

No. 83-261

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

CARSON S. GABLE, JOSEPH S. DADDONA, and THE CITY OF ALLENTOWN,

Petitioners

v.

ROGER SAMES and DENNIS TROCCOLA,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITIONERS' PETITION FOR CERTIORARI

COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether, a Court of Appeals, upon a showing of exceptional or extraordinary circumstances and after weighing the issues of prejudice, the explanation for the delay in appealing and the substantiality of the rights involved, may exercise its discretion pursuant to Federal Rule of Civil Procedure 60(b) and permit a party to petition the District Court to vacate and re-enter judgment for the purposes of reviving a lost right of appeal?

COUNTERSTATEMENT OF THE CASE

Case Summary

This matter came before the Circuit Court as an appeal from what Respondents argue was a precipitous and improper granting of Petitioners' Motions for Summary Judgment and to Dismiss, by the District Court.

The Circuit Court heard argument upon the merits of the appeal indicating at oral argument that the lower court's actions were, at best, improvident. The Circuit Court also made it known, *sua sponte*, that the District Court (as well as all parties) might have erred in the conclusion that the District Court had lost its jurisdiction to the Circuit Court by reason of Respondents' timely filing of a Notice of Appeal.

After review of supplemental briefs upon that issue, the Circuit Court in fact concluded that the Respondents' Motion for Reconsideration/Reargument [under Local Rule 20(g)] should be treated as a timely Federal Rule 59(e) Motion (which acts as a supersedeas). The Circuit Court further concluded that the District Court had erred in holding that the Notice of Appeal had divested it of jurisdiction since under *Griggs v. Provident Consumer Discount Co.*, 103 S. Ct. 400 (1982) (per curium), a Notice of Appeal filed during the pendancy of a Rule 59(e) motion is deemed a nullity. Accordingly, and under all the circumstances, the Circuit Court dismissed the appeal without prejudice to the Respondents' filing of an appropriate Rule 60(b) motion in the district court, the intent of which expressly was to have that court vacate and re-enter its judgment so as to allow Respondents to appeal from the re-entered judgment.

Thereafter, the Petitioners filed a Petition for Rehearing in the Circuit Court, which was denied. This Brief In Opposition is in response to Petitioners' subsequently filed Petition For Writ of Certiorari before this Honorable Court, wherein Petitioners challenge the Circuit Court's discretionary disposition of the aforementioned procedural issue.

Proceedings Before the District Court

On March 18, 1982, Repsondents commenced an action in the United States District Court for the Eastern District of Pennsylvania. Their verified complaint alleged, *inter alia*, that they had been sergeants on the Allentown Police Force, that they had acquired their rank pursuant to the promotional policy in effect at the time of their respective promotions, that they were, at all times relevant, deserving of their rank as sergeants and that they had been demoted to patrolmen for political reasons, without prior notice or an opportunity to be heard. Jurisdiction of the District Court was pursuant to 42 U.S.C. §§1983 and 1985. Respondents also invoked the pendant jurisdiction of that court for their various state claims.

On April 8, 1982, Petitioners by their legal counsel filed a Motion to Dismiss.

While the Petitioners' Motion to Dismiss was pending, discovery had commenced. Respondents' discovery consisted of deposing Allentown Police Chief Carson S. Gable, the Mayor of Allentown Joseph S. Daddona, Assistant Police Chiefs David M. Howells, Sr. and Charles Charles, Patrolmen Thomas Fallstich and Thomas E. Kloss. Respondents also propounded interrogatories upon the Petitioners as well as a Motion for Production of Documents. The propounded interrogatories were never answered by Petitioners. Likewise, the individual requests contained in the Motion for Production of Documents were either objected to or never answered.

On or about May 20, 1982, the Petitioners moved the District Court for Summary Judgment. As the sole basis of Petitioners' Motion they alleged the denial of the existence of political motivation in their decision to demote, and, contended further that, under Pennsylvania law, the Respondents were not entitled to either advance notice nor an opportunity to be heard prior to their demotions. This Motion was made despite Petitioners' knowledge that the parties had agreed upon and sched-

uled further depositions, and with already existing discovery unanswered by Petitioners and, in fact, seriously in default.

Orders and corresponding Judgment were entered in favor of Petitioners by the District Court on June 25, 1982 *without* prior notice, *without* an opportunity for hearing or oral argument, *before* opposing affidavits could be filed, *before court-ordered* discovery was provided (to wit, *Petitioners'* Answers to Respondents' Interrogatories), and *before* more than one half of the depositions previously taken by Respondents *had even been filed* (and thus available to the court for consideration). Said Orders were also entered in obvious defiance of Pennsylvania case and statutory law declaring a police sergeant's rank to be constitutionally protected property which can only be taken away by a process which is legally due.

On July 8, 1982, Respondents, pursuant to local Rule 20(g), filed in the District Court a Motion for Reconsideration/Reargument. Because Respondents' local Rule 20(g) Motion did not act as a supersedeas and because the District Court failed to Reconsider within the thirty (30) day appeal period, Respondents filed a Notice of Appeal in that same court on July 23, 1982, the last possible day to appeal.

On August 10, 1982, Petitioners filed an Answer to Respondents' Motion for Reconsideration. Significantly, Petitioners vigorously argued that Respondents' timely filed Notice of Appeal to the Court of Appeals divested the District Court of jurisdiction.

On September 15, 1982, the District Court, per the Honorable E. Mac Troutman, entered an Order denying Respondents' Motion for Reconsideration predicated upon its conclusion that Respondents' Notice of Appeal removed Respondents from the District Court's jurisdiction to that of the Court of Appeals (page one of said Order). Judge Troutman, nevertheless went on to briefly address the issues raised by Appellants in an effort "to

assist the Court of Appeals in *its determination of the issues on appeal . . .*" (Emphasis added).

Proceedings Before the Court of Appeals

Thereafter, the substantive issues were fully briefed by both Respondents and Petitioners. The matter was orally argued on April 11, 1983, before the Third Circuit Court of Appeals.

At oral argument, the Third Circuit, *sua sponte*, raised the issue of its jurisdiction. The Court, although hearing oral argument on the substantive issues raised, requested further briefing by counsel on the jurisdictional issue. Neither Petitioners nor Respondents had previously perceived or anticipated any such issue.

Post-argument briefs were thereafter submitted to the Court below. Through these briefs, and in an obvious attempt to defeat Respondents' rights to appellate review, Petitioners reversed their previous position and argued that at all times relevant hereto, jurisdiction *was* properly vested with the District Court. Petitioners further argued that since Respondents failed to appeal from the District Court's September 15, 1982 Order denying reconsideration of its June 23, 1982 Order, Respondents' rights to further appellate review were extinguished.

On June 15, 1983, the United States Court of Appeals for the Third Circuit recognized that Petitioners were attempting to unjustly benefit from their misrepresentations to the District Court, and that the District Court had erred in concluding that jurisdiction had vested with the Circuit Court. The Circuit Court dismissed Respondents' appeal, without prejudice, and allowed Respondents "to move the District Court under Fed. R. Civ. P. 60(b) to vacate and re-enter judgment so as to allow [Respondents] to appeal from the re-entered judgment". Under the facts in this case the Third Circuit characterized this procedure as "provid[ing] a fair result for both parties".

Petitioners sought rehearing in the Third Circuit. On July 14, 1983, Petitioners' Petition for Rehearing was denied. Their *Petition for Writ of Certiorari* followed.

ARGUMENT

Summary of Argument

The June 15, 1983 Order of the Court of Appeals was a proper exercise of its discretion and does not warrant a review upon a Writ of Certiorari to this Honorable Court since it is in complete harmony with the decisions of this Honorable Court as well as all other Courts of Appeal.

Petitioners have drawn upon cases with widely dissimilar factual predicates to dissever the instant decision from its clear place in the mainstream of federal procedural practice.

At bar is a case wherein the Court of Appeals *sua sponte* raised and concluded, that the District Court erred in finding that Respondents' Notice of Appeal was efficacious. Rather, the Court of Appeals concluded that under the holding in *Griggs v. Provident Consumer Discount Co.*, 103 S. Ct. 400 (1982), the filed Notice of Appeal was premature and, accordingly, a nullity. Because Respondents justifiably relied upon the finding of the District Court and proceeded in good faith upon the prosecution of their appeal, because the *Petitioners* believed and vigorously argued that the Notice of Appeal *was* timely, because there has been no trial on the merits, because the Petitioners would not be prejudiced, and because justice required, the Court of Appeals concluded that the best procedure to produce "a fair result for both parties" was to dismiss the appeal without prejudice to Respondents' filing of an appropriate Rule 60(b) Motion in the District Court.

The Court of Appeals did not abuse its discretion but rather rendered a decision guided by accepted legal principles previously and consistently employed under similar circumstances, not only by it but, by this Honorable Court and virtually all other Courts of Appeal.

The prerequisites for invoking the exercise of this Honorable Court's power of supervision over such a

well-settled (and considerably perfunctory) procedural issue, simply do not obtain.

Settled Test Governing Review on Writ of Certiorari

As this Honorable Court is well aware, a review on Writ of Certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. U.S. Supreme Court Rule 17.1. Examples of appropriate reasons for granting certiorari include conflicting decisions of Courts of Appeal, a decision of a Court of Appeals which has so far departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Honorable Court's power of supervision, occasions when a federal Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or when a federal court has decided a federal question in a way in conflict with decisions of this Court. U.S. Supreme Court Rule 17.1(a) and (c).

In their Petition, Petitioners urge this Honorable Court to issue its writ because "the decision below . . . seriously hampers proper and uniform administration of the rules of procedure governing litigation; and conflicts with and departs from decisions rendered by this Honorable Court, other decisions rendered by the Court of Appeals and decisions rendered by other Courts of Appeal . . ." *Petition for Writ of Certiorari*, p. 8. Upon closer examination and for the reasons which follow, it is abundantly clear that the Third Circuit's Opinion *is* consistent with the law of the various circuits and with decisions rendered by this Honorable Court.

Exercise of This Honorable Court's Power of Supervision Unwarranted

The instant application for review upon a Writ of Certiorari is the last in a protracted series of Petitioners' ill-conceived attempts to avoid having Respondents

cause of action heard upon the merits and, in no way approaches the "special and important reasons" threshold established for review by this Honorable Court. United States Supreme Court Rule 17.

At the heart of this matter is the Court of Appeals' reference to Fed. R. Civ. P. 60(b).

Relief from judgment after the appeal time has expired is governed by Fed. R. Civ. P. 60(b). Under subdivisions (b)(1) - (b)(5) of this rule, the District Court undoubtedly has the power to vacate a judgment in appropriate circumstances and rehear the case, and the judgment entered after rehearing is appealable in due course, though it may be in substance the same as the first. 9 *Moore's Federal Practice* ¶204.13(5). Fed. R. Civ. P. 60(b)(6) permits relief from judgments for "any other reason justifying relief from the operation of the judgment". It has been written that in extraordinary circumstances, Fed. R. App. P. 4, while absolute in its terms prescribing time for appeals, should be read as having no affect upon the limited class of cases that fall within Fed. R. Civ. P. 60(b)(6). *Id. See generally*, 7 *Moore's Federal Practice* ¶60.27(2).

This Honorable Court, as well as a majority of the Circuit Courts of Appeal, has expressly stated or implied that as long as circumventing the impact of Fed. R. Civ. P. 77(d) is not the *sole* reason for seeking relief pursuant to Fed. R. Civ. P. 60(b), Rule 60(b) may be used to avoid the restrictive measure of Fed. R. App. P. 4(a) upon a showing of compelling, exceptional or extraordinary circumstances. *Klapprott v. U.S.*, 335 U.S. 601, 93 L.Ed. 266, 69 S.Ct. 384 (1949); *Hensley v. Chesapeake & Ohio Railway Co.*, 651 F.2d 226 (4th Cir., 1981); *Fidelity & Deposit Co. v. Usaform Hail Pool, Inc.*, 523 F.2d 744 (5th Cir., 1975) *cert. denied* 425 U.S. 950, 48 L.Ed.2d 194, 96 S.Ct. 1725 (1976); *International Controls Corp. v. Vesco*, 556 F.2d 665 (2nd Cir., 1977) *cert. denied* 434 U.S. 1014, 54 L.Ed.2d 758, 98 S.Ct. 730 (1978); *Braden v. University of Pittsburgh*, 552 F.2d 948 (3rd Cir.,

1977); *Kramer v. American Postal Workers Union, AFL-CIO*, 556 F.2d 929 (9th Cir., 1977); *Scola v. Boat Frances, R., Inc.*, 618 F.2d 147 (1st Cir., 1980); *Smith v. Jackson Tool & Die, Inc.*, 426 F.2d 5 (5th Cir., 1970); *Vasquez v. Brezenoff*, 93 F.R.D. 583 (1982).

As stated by the First Circuit:

> . . . [I]n proper cases Rule 60(b) has been taken to authorize motions to vacate and re-enter judgments for the purposes of reviving a lost right to appeal. *Buckeye Cellulose Corp. v. Braggs*, 569 F.2d 1036, (8th Cir., 1978), *Fidelity & Deposit Co. v. Usaform Hail Pool, Inc.*, 523 F.2d 744 (5th Cir., 1975) *cert. denied* 425 U.S. 950 (1976); *Expeditions Unlimited Aquatic Enterprises, Inc. v. Smithsonian Institute*, 163 U.S. App. D.C. 140, 500 F.2d 808 (D.C. Cir., 1974); *Smith v. Jackson Tool & Die Co.*, 426 F.2d 5 (5th Cir., 1970); *Braden v. University of Pittsburgh*, 552 F.2d 948 (3rd Cir., 1977)[;] any such motion would have called for an exercise of a judicial discretion that weighed the issues of prejudice, the explanation for the delay in appealing, and the substantiality of the rights involved. *Scola v. Boat Frances, R., Inc.*, 618 F.2d at 152.

When viewed in the light of the three (3) factors outlined in *Scola v. Boat Frances, R., Inc., supra*, the Third Circuit's judgment was a sound exercise of judicial discretion that should not be the subject of review by this Honorable Court.[1]

Significantly, Petitioners have not suggested that the subject Order prejudices them in any way. Cer-

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1. Just last term, two Justices of this Honorable Court recognized that Courts of Appeal have the authority in certain, extraordinary circumstances to permit an appellant to ask the District Court to vacate and re-enter its judgment so as to permit a timely appeal. *James v. United States*, ____ U.S. ____, 74 L.Ed.2d 615 (1982). Justice Brennan characterized this procedure as being in the Courts of Appeal residual appellate jurisdiction. 74 L.Ed.2d at 616, footnote 6.

tainly, it has not subjected them to "loss of proof". *McCawley v. Fleishmann Transp. Co.*, 10 F.R.D. 624 (S.D. New York 1950), *U.S. v. Karahalias*, 205 F.2d 331 (2nd Cir. 1953). The substantive issues here involved have already been fully researched, briefed and argued. Prior to the April 11, 1983 argument before the Third Circuit, it was conceded by Petitioners that jurisdiction was with said Court. The Third Circuit has indicated that the parties may use the same briefs and, in the event the District Court vacated and re-entered judgment, the subsequent appeal has been ordered expedited. Therefore, there would be no additional cost or passage of an undo length of time.

Similarly, the equities in the explanation for the delay in appealing weigh with Respondents. Petitioners either negligently or fraudulently misrepresented to the District Court that by virtue of the July 22, 1982 Notice of Appeal said Court no longer had jurisdiction to hear the matter. At that time, Petitioners contended that jurisdiction had vested with the Third Circuit. The District Court was persuaded and, expressly held that it was without jurisdiction and that the matter was properly before the Third Circuit. The Third Circuit, exercising its judicial discretion and supervisory powers, concluded that Petitioners should not now be permitted to benefit from their misrepresentations to the District Court. Likewise, the Third Circuit concluded that Respondents' failure to file a new Notice of Appeal was justified by their reliance upon the District Court's erroneous conclusion that the previous Notice of Appeal was viable and that jurisdiction was properly with the Third Circuit. Where subsequent events [here, the Court of Appeals equating Respondents' local Rule 20(g) Motion to a Fed. R. Civ. P. 59(e) Motion and thereby declaring the Notice of Appeal a nullity] make it unjust to deny Rule 60(b) relief, the Court of Appeals has not previously hesitated to intervene. *Kelly v. Greer*, 334 F.2d 434 (3rd Cir., 1964). After weighing the aforesaid factors against

the general policy of finality of judgments, the Third Circuit exercised its discretion in favor of Respondents' right to have matters affecting their substantial rights heard on the merits.

Petitioners contend however that, the foregoing notwithstanding, the compelling circumstance which occasioned the instant omission (i.e., Respondents' failure to file a new Notice of Appeal) do not rest with the District Court and were not substantially contributed to by Petitioners. According to Petitioners, "The District Court never opined on the validity of Respondents' Notice of Appeal . . ." *Petition for Writ of Certiorari*, page 15.

This statement is pure sophistry. Since an *un*timely appeal would not divest the District Court of jurisdiction, implicit in the court's conclusion that it *was* divested of jurisdiction is the conclusion that the Notice of Appeal *was* timely.

Judge Troutman specifically held, in pertinent part, as follows:

> . . . On July 22, 1982, Plaintiff filed a Notice of Appeal which *divested this Court of jurisdiction to consider the instant motion*. This rule enjoys a long history of acceptance, *Hovey v. McDonald*, 109 U.S. 150, 157 (1883), and remains undiluted by the passage of time. *Plant Economy, Inc. v. Mirror Insulation Co.*, 308 F.2d 275, 27677 (3rd Cir. 1962). Indeed, the Third Circuit considers the rule "well settled". *Securities & Exchange Commission v. Investors Security Corp.*, 560 F.2d 561, 568 (3rd Cir. 1977). However, because we retain "limited authority to . . . assist the Court of Appeals . . . in its determination" of the issues on appeal, *Id.*, we briefly address the issues raised by Plaintiff's motion. Order of September 15, 1982, p. 1, *Petition for Writ of Certiorari*, p. A-14. (Emphasis Added)

Petitioners also fail to mention that the District Court's holding came on the heels of the following argument made by Petitioners, quoted directly from the opening paragraph of their Memorandum of Law in Opposition to (Respondents') Motion for Reconsideration:

> It is a general rule that the filing of a *timely* and sufficient Notice of Appeal *effectively transfers jurisdiction from the District Court to the Court of Appeals* with respect to any matter involved in the appeal. It divests the District Court of jurisdiction to proceed further in the matter *except in aid of the appeal* . . .
>
> . . . Accordingly, this Court based upon [Respondents'] *timely Notice of Appeal filed with the Court of Appeals*, should dismiss [Respondents'] Motion for Reconsideration and Reargument because of lack of jurisdiction. (Citations Omitted, Emphasis Added).

Though unmentioned in the written Opinion of the Court of Appeals, other factors clearly present in the instant case which have historically mitigated in favor of applying Rule 60(b)(6) include the fact that there has been no trial on the merits [*Ackermann v. United States*, 340 U.S. 193, 71 S. Ct. 209 (1950)], that the moving party has shown a meritorious claim [*Sebastiano v. United States*, 108 F. Supp. 278 (N.D. Ohio, 1951)], and the fact that the proper exercise of the court's discretion should ordinarily incline towards granting rather than denying Rule 60(b)(6) relief. *In re: Estate of Cremidas*, 14 F.R.D. 15 (D. Alaska, 1953).

Petitioners' Citations Inopposite

Petitioners cite several cases as authority for their argument that the instant decision of the Court of Appeals departs from prevailing federal practice. Even the most cursory review of those cases will quickly reveal

that they are easily distinguished from the case at bar.[2] Each is conspicuously without a single extenuating circumstance inviting, inducing or accounting for the invalidity of the filed appeal. Nowhere has Petitioner sought to compare the consequence of those litigants' own lack of diligence with the conduct of Respondents within. We are not talking about a standardless residual discretionary power to set aside judgments, but rather, "a grand reservoir of equitable power to do justice in a particular case. . ." 7 *Moore's Federal Practice*, ¶60.27(2) at pp. 375-76 and the cases thereunder quoting *Treatise*.

Petitioners' Other Arguments Irrelative And/Or Unfounded

Any connection between Petitioners' remaining arguments and the issue of whether or not the instant matter warrants review by our highest court, appears purely accidental.

Though not easily discerned from Petitioners addlepated argument, their first contention appears to be simply that Fed.R.App.P. 26(b) prohibits the operation of Fed.R.Civ.P. 60(b). That Petitioners fail to cite a single case for such a proposition is understandable, since these two rules have operated harmoniously since their inception.

Petitioners also argue, in passing, that Respondents' Rule 60(b) Motion was untimely in that "more than one (1) year has passed since the District Court's June 25, 1982, Order was entered." *Petition for Writ of Certiorari*, p. 14. This is simply untrue.

Petitioners' Rule 60(b) Motion was made and served on June 24, 1983. Even though Rule 60(b)(6) has no one (1) year limitation, the District Court is free to

2. The oft-cited *Griggs* case for example, did not, as Petitioners contend, emasculate Rule 60(b)(6). In fact, it did not even contemplate the rule since *Griggs* dealt with an instance of pure "inadvertance" and not "compelling circumstances".

choose from among the other sub-sections since the reasons urged justify relief upon several grounds, and since the Motion was made within a reasonable time [nine (9) days after the Court of Appeals' Order of June 15, 1983] and within one (1) year of both of the District Court's Orders of June 25, 1982 and September 15, 1982.

Finally, Petitioners admit that the Opinion of the Court of Appeals may justifiably rest upon "unique" or "extraordinary" circumstances, *Petition for Writ of Certiorari*, pp. 12 and 15, but they nonetheless argue that the Court of Appeals concluded that there were none here presented. Again, Petitioners display a disaffection toward the written word. The Court of Appeals simply and distinctly concluded that in the presence of compelling Rule 60(b) factors, they need "not consider whether this case involves 'unique circumstances' such as those recognized by the Supreme Court in *Thompson v. INS*, 374 U.S. 384 (1964) (per curium). "*Petition for Writ of Certiorari*, p. A-6.

In sum, one can only conclude that Petitioners misperceive the nature of the judgment of the Third Circuit in the instant case. After raising the issue *sua sponte*, the Third Circuit concluded that it did not have jurisdiction to proceed in this matter, yet in the interest of substantial justice, exercised its discretion due to the compelling reasons presented and concluded that Respondents were entitled to seek relief pursuant to Fed. R. Civ. P. 60(b). As evidenced by the afore-cited cases, this form of relief is available in virtually every Circuit and, while this Honorable Court has stated that extraordinary circumstances should rarely be found, *Ackermann v. U.S.*, *supra*, this Honorable Court has nonetheless utilized this procedure on occasion to promote the interests of justice. See *Klapprott v. United States*, 335 U.S. 601, 93 L.Ed.266, 69 S. Ct. 384 (1949). The appropriate question is therefore, not whether the Third Circuit can do indirectly what it cannot do directly, but rather, whether the Third Circuit abused its

discretion in concluding under the facts of this case, that compelling reasons were present entitling Respondents to relief pursuant to Rule 60(b). *Perrin v. Aluminum Co. of America*, 197 F.2d 254 (9th Cir. 1952).

Try as they may, Petitioners cannot in the fact that Rule 60(b) has been consistently and historically "liberally applied to accomplish justice". 7 *Moore's Federal Practice*, ¶60.27(2). Try as they may, they cannot ignore the fact that it was *their* misrepresentation which prompted the District Court's error which was at the heart of this (now) justiciably corrected imbroglio.

CONCLUSION

By this writ, Petitioners seek to have this Honorable Court review the Court of Appeals' discretionary grant of relief to Respondents pursuant to Fed.R.Civ.P. 60(b).

While Petitioners boldly allege that the aforesaid decision "charts" and/or "maps" a new course, it is clear that they are viewing the wrong polestar. They have failed to cite a single case, at any level, which is at variance with the decision of the Court of Appeals.

The opinion and judgment of the Court of Appeals was the result of a well-reasoned approach that balanced the desirable general policy of finality of judgments against the factors of prejudice to Petitioners, the explanation for Respondents' delay and the substantial rights of the parties. The analysis and conclusion of the Third Circuit resulted in an exercise of sound judicial discretion that, under the facts and circumstances presented, including the District Court's jurisdictional misinterpretation, should not be disturbed. There exists no conflict either between the Third Circuit's judgment and the decisions of this Honorable Court or, between the Circuit Courts of Appeal, on the issue presented. Therefore, Respondents respectfully request this Honorable Court deny Petitioners' Petition for Writ of Certiorari.

Respectfully Submitted,
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No. 83-261

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

CARSON S. GABLE, JOSEPH S. DADDONA, AND THE CITY OF ALLENTOWN,
Petitioners

v.

ROGER SAMES AND DENNIS TROCCOLA,
Respondents

REPLY BRIEF FOR PETITIONER

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

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TABLE OF CITATIONS

REPLY BRIEF FOR PETITIONERS

The brief submitted in opposition to the petition for writ of certiorari attempts to dissuade this Honorable Court from reversing an obvious maneuver to evade the clear implications of respondents' failure to comply with the plain terms of explicit procedural rules governing the litigation which respondents commenced. The misstatements contained in and the facts omitted from respondents' brief compel the submission of this response for petitioners.

Respondents' denouncement of the application of those rules and their mischaracterization of the situation as one in which they stood only as innocent victims of the petitioners' machinations call to mind the procedural tenor struck by respondents in the initial stages of this litigation. Although obviously ignored by respondents, the record in this case reveals that respondents sought initially to deprive petitioners of any opportunity to contest the strength of respondents' allegations. When petitioners' district court counsel was first notified of respondents' complaint, he telephoned respondents' counsel and requested an extension of time to act on petitioners' behalf. The request was made because petitioners' counsel of choice had not yet been furnished with respondents' complaint and because his notification was received only during the Easter solemn days. Respondents' attorney flatly refused the request for extension of time, and then watched the district court's dockets like a vulture until 3:00 o'clock of the afternoon of the day set by the rules for respondents' initial pleading. In spite of his knowledge that petitioners' district court counsel timely filed a motion to dismiss the complaint, and a petition for enlargement of time to act (docket entries), respondents' counsel then requested the clerk to enter a default and later filed a motion for entry of default (*Id.*). Respondents' motion contended that petitioners' motion should be disregarded because it was not accompanied by a brief allegedly required by Local Rule 20(c), and because the motion was not

postmarked until April 12, 1982. Petitioners' motion recited the grounds and certain authorities and was accompanied by a memorandum of law that was fully supplemented before respondents' filed their motion for default. Petitioners' motion was also accompanied by a proof of service stating that it was mailed timely before it was postmarked. The district court ultimately denied respondents' motion. Respondents never questioned this ruling in the district court or elsewhere, although they have later sought to invoke procedural rules to prolong the litigation and denounce the implementation of procedural rules as unfair.

Respondents would have this Honorable Court believe that the district court acted precipitously and improperly in ultimately granting petitioners' motions to dismiss and for summary judgment, and that the court of appeals believed "that the lower court's actions were, at best, improvident" (Brief in Opposition To Petitioners' Petition for Certiorari, p. 2). The court of appeals did not express any such belief in its opinion and refrained explicitly from ruling on the merits of respondents' appeal. Upon complete consideration of the record and applicable case law, one cannot reasonably contest the district court's action. On the one hand, respondents predicated their property right to their sergeant stripes upon a state law that has no application to them, as correctly found by the district court. On the other hand, apart from the controlling point that respondents' demotions were not procedurally unlawful, the record clearly establishes that the district court did not act precipitously.

Respondents assert that the district court's final order and judgment were entered "*without* prior notice, *without* an opportunity for hearing or oral argument, *before* opposing affidavits could be filed, *before court-ordered* discovery was provided (to wit, *Petitioners'* Answers to Respondents' Interrogatories), and *before* more than one half of the depositions previously taken by Respondents *had ever been filed* (and thus available to the court for consideration)" (Brief In Opposition To Peti-

tioners' Petition For Certiorari, p. 4) (Emphasis in original). Respondents fail to acknowledge to this Honorable Court that they knew of petitioners' motion for summary judgment because they responded to its merits and to the merits of petitioners' outstanding and supplemented motion to dismiss (Docket Entries 15 & 16). Respondents also fail to disclose that, before it ruled on the petitioners' motions, the district court sent a letter to respondents' counsel advising him of the filing of the summary judgment motion and the need for a response from his clients. As noted by the district court (Petition For Writ Of Certiorari, p. A-16), "[t]he notice provisions of Fed. R.Civ. P. 56 were more than adequately met in that [respondents] had 'prior knowledge that the court was considering . . . summary judgment'. *Bryson v. Braud Insulations, Inc.*, 621 F.2d 556, 559 (3 Cir. 1980)". The other assertions by respondents are equally disingenuous.

Subsection (f) of Local Rule 20, which respondents had previously cited in their attempt to avoid contest of their claims by default, explicitly advises that the parties have no vested right to oral argument. Respondents acknowledged in their motion for reconsideration that hearing or oral argument was a "priviledge" [sic] (Appendix For Appellants, p. 302, ¶2), and the district court correctly observed that "whether oral argument on any particular motion is warranted is committed to the Court's sound discretion" (Petition For Writ Of Certiorari, p. A-16).

Respondents' lament that the district court acted "*before* opposing affidavits could be filed" is belied by their statement in their motion for reconsideration "that Plaintiffs, by copy of affidavits 'A' through 'E' attached hereto, were at all times capable of demonstrating the basis for said claim" (Appendix For Appellants, p. 303, ¶4). Respondents instead chose to rely on the allegations of their complaint. As correctly noted by the district court (Petition For Writ Of Certiorari, pp. A-14 and A-15), established law ruled out the efficacy of both respondents' pleading reliance and the belatedly withheld

affidavits. In addition, respondents have never proffered a reason why they were "prevented" from submitting with their response to petitioners' motion that evidence which they were admittedly "at all times capable of demonstrating".

Respondents' assertion that the district court acted precipitously "before court-ordered discovery was provided (to wit, Petitioners' Answers to Respondents' Interrogatories)" is misleading in two fundamental respects. First, at no time did respondents request that the district court order and at no time did the district court order petitioners to answer respondents' interrogatories. The district court's docket entries reveal that the only motion for sanctions filed by respondents was denied (Entry no. 30), and that the only order referring to answers to interrogatories was that which was directed to respondents (Entry no. 33). Second, those interrogatories were directed to and addressed the issues presented to the very same persons whose depositions respondents had already taken. Respondents have never suggested that their claims would be established by petitioners' answers to interrogatories when those interrogated by deposition refuted those claims. Any implication by respondents that their case depended upon petitioners' answers to interrogatories vanishes in light of respondents' declaration to the district court that "Plaintiffs' discovery prior to Defendant's [sic] Motion for Summary Judgment was in its infancy and had consisted solely of the testimony of adverse deponents upon whom plaintiffs' [sic] never intended to rely to establish 'specific facts' concerning the issue of 'politically motivated firing' " (Appendix For Appellants, p. 303, ¶4).

Respondents' final claim of injustice by reference to depositions is refuted not only by their reconsideration admission that "Plaintiffs believe that [the district court] was unaware that Plaintiffs' discovery was in its infancy and had consisted only of the testimony of adverse deponents upon whom Plaintiffs' [sic] never intended to rely to establish 'specific facts' concerning the issue of 'politi-

cally motivated firing' " (Appendix For Appellants, p. 303, ¶4), but by their simultaneous reference to affidavits which respondents "were at all times capable of demonstrating" (*Id.*), and by reference to the record presented to the court of appeals. That record indicated that the depositions presented and referred to by respondents to the court of appeals were not taken by respondents and were taken after the district court had ruled on the merits of petitioners' motions (Appendix For Appellants, pp. 318, 398). Moreover, that record and the district court's docket entries also establish that the depositions in question were taken several weeks after respondents filed their motion for reconsideration. Any suggestion that petitioners' district court counsel duped respondents into an agreement to take depositions while trapping respondents by a motion for summary judgment is not only denied by petitioners' district court counsel but also belied by the record in this case.

Respondents' cavalier and misleading treatment of the development of this case before the district court also taints their assertions regarding the post-judgment events pertinent to the issue before this Honorable Court. Respondents strive to lay blame upon the district court and upon petitioners for the nullification of their appeal. Neither petitioners nor the district court urged or in any way induced respondents to make their F.R.A.P. 4(b)(4) motion or to file a notice of appeal before that motion was withdrawn or decided. What placed respondents in the "predicament" in which they should remain — to be satisfied with a final judgment that is proper upon the district court's record — is their own unprompted action in filing a F.R.A.P. 4(a)(4) motion and a notice of appeal before the district court acted on that motion. Simple reference by respondents' learned counsel to F.R.A.P 4(a)(4) and to the authorities controlling the nature of their motion, *e.g.*, *Hattersley v. Bollt*, 512 F.2d 209, n.17 at 215 (3 Cir. 1975); *Richerson v. Jones*, 572 F.2d 89, 93 (3 Cir. 1978); *Sonneblick-Goldman Corp. v. Norwalk*, 420 F.2d 858, 859 (3 Cir.

1970); *Gainey v. Brotherhood of Railway & Steamship Clerks*, 303 F.2d 716, 718 (3 Cir. 1962); *see also, Griggs v. Provident Consumer Discount Co.*, 103 S.Ct. 400, 407 (Justice Marshall, dissenting), and *United States v. Dieler*, 429 U.S. 6, 97 S.Ct. 18, 50 (L.Ed. 2d 8 (1976), would have alerted respondents that their post-judgment motion fell within the scope of F.R.A.P. 4(a)(4). Respondents' offer that their notice of appeal was filed because their post-judgment motion "did not act as a supersedeas" (Brief In Opposition To Petitioners' Petition For Certiorari, p. 4) and their argument to the court of appeals that their motion was not encompassed by F.R.A.P. 4(a)(4), constitute as ineffective an excuse to recreate appellate jurisdiction to vacate the district court's final order and judgment as did respondents' original notice of appeal. Without the slightest justification for tactical moves admittedly unprovoked by either petitioners or the district court, respondents devote the balance of their brief in opposition to distractions which should not deter this Honorable Court from accomplishing that practical and swift grant of certiorari and reversal for affirmance of the district court's judgment as was accomplished in *Griggs v. Provident Consumer Discount Co.*, 103 S.Ct. 400, 74 L.Ed. 225 (1982), on remand, 699 F.2d 642 (3 Cir. 1983).

Respondents note that "[a]t the heart of this matter is the Court of Appeals' reference to Fed. R. Civ. P. 60(b)" (Brief In Opposition To Petitioners' Petition For Certiorari, p. 9), and immediately refer to Professor Moore's treatise for their proposition that, notwithstanding the strictures placed upon the courts to extend the time for appeal, a court of appeal may *sua sponte* invite a derelict appellant to regenerate appellate jurisdiction by moving the district court to vacate and reinstate a judgment which the district court validly entered and reconsidered as valid. Respondents' reference to "generally, 7 Moore's Federal Practice ¶60.27(2)" (*Id.*) cannot be found in the current edition of that work. The statements attributed to Volume 9 of the treatise are incom-

plete, because the treatise makes it clear that "it would be nonsense to hold that the intention was to limit the power of the court to extend the time for appeal on ground of excusable neglect to 30 days under [F.R.A.P. 4], and permit extension on the same ground within a year under [F.R.A.P. 60(b)]." *Moore's Federal Practice*, ¶204.13[5], p. 4-110, and that "Absent these special circumstances, it appears abundantly clear from both the text and history of Rule 4(a)(5) that it serves as a mandatory limit on the power of the district court to excuse the failure to file a timely notice of appeal on the ground of excusable neglect, whether such neglect is based on failure to learn of the judgment or otherwise", *Id.*, p. 4-112.

Respondents then cite a string of cases for the proposition that "as long as circumventing the impact of Fed. R. Civ. P. 77(d) is not the sole reason for seeking relief pursuant to Fed. R. Civ. P. 60(b), Rule 60(b) may be used to avoid the restrictive measure of Fed. R. App. P. 4(a) upon a showing of compelling, exceptional or extraordinary circumstances" (Brief In Opposition To Petitioners' Petition For Certiorari, pp. 9-10). One may ignore this statement and the remainder of respondents' brief, all of which subsume that the court of appeals in fact found such circumstances, because the court of appeals explicitly stated that it "will not consider whether this case involves 'unique circumstances' such as those recognized by the Supreme Court in Thompson vs. INS, 375 U.S. 384 (1964) (per curiam)" (Petition For Writ of Certiorari, p. A-6, n.3). A review of the cases cited by respondents reveals not only that none of them considered or implemented *Griggs* (which they all preceded), but also that they offer no support for the action taken by the court of appeals to extend indirectly the time for review of the district court's judgment and order:

— *Klapport* involved a default judgment effected by the government in a deportation case against an impoverished defendant who could not afford counsel and who was prevented by the govern-

ment seizure of his draft answer and request for pro bono assistance and by his incarceration by the government from taking appropriate action.

— *Hensley* found no compelling circumstances to side-step F.R.A.P. 4(a) even though the district court had entered an order noting that appellant intended to appeal if its new trial motion were denied.

— *Fidelity & Deposit Co.* involved F.R.C.P. 77, which is not at issue here, and afforded relief to an appellant who took prompt action to rectify a situation created by a district court's express assurance that its continued efforts to perfect a timely appeal could cease.

— *International Controls Corp.* afforded the appellant no relief.

— *Braden* dealt with a certification order not controlled by Rule 4(a).

— *Kramer* found no compelling circumstances.

— *Scola* dealt with an amended judgment from which the appeal was taken to reinstate the original judgment, and the quotation offered by respondents (Brief In Opposition To Petitioners' Petition For Writ Of Certiorari, p. 10) is dictum, the court having prefaced its remarks with the statement that, "It is not necessary, then, to deal with defendants' other arguments", 618 F.2d at 151.

— *Smith* found unique circumstances incomparable to those advanced here by respondents.

— *Vasquez* involved F.R.C.P. 77 and false assurances by the district court that final judgment was not entered.

None of these cases provide the slightest assistance to respondents. Respondents unquestionably knew of peti-

tioners' motion for summary judgment. Respondents should have anticipated that the district court would rule on the motion, if only because respondents had contested it on the merits. Respondents did not insist upon oral argument, and their admissions in the district court bear witness to their anticipation that oral argument would not be granted. Respondents knew of the district court's actions, and were free and able to take further action through counsel who professed astuteness in procedural rules. Respondents were in no way foreclosed wrongfully from disclosing the existence of facts in support of their claims, and their belated disclosure of evidence admittedly available to them "at all time material" was patently insufficient. Respondents took a highly inimical stance towards petitioners, attempting to draw them into default, opposing their motions, giving no procedural quarter or credence, and ultimately asserting that their proofs did not lie with respondents. Respondents could not seriously be heard to have relied reasonably upon anything said or done by petitioners, and their circumstances fail to condone any evasion of the dismissal without relief contemplated and effected in *Griggs, supra.*

Respondents finally grasp at the district court's reconsideration order and the court of appeals' opinion and divine from them an implied ruling from the district court that respondents could ignore F.R.A.P. 4(a) and obtain effective appellate relief, and an implied ruling from the court of appeals that respondents' case presented unique and extraordinary circumstances compelling the court of appeals hold that respondents may be entitled to Rule 60(b) relief. The rulings divined by respondents cannot reasonably be found in the lower courts' rulings.

The district court's discussion of "lack of jurisdiction", like that made by petitioners in opposition to respondents' post-judgment motion, merely indicated, as revealed by the citations to *Securities & Exchange Commission v. Investors Security Corp.*, 560 F.2d 561, 568 (3 Cir. 1977), that the district court should not act dur-

ing the pendency of an appeal. No comment was made that this forebearance confirmed the validity of the appeal. The court of appeals obviously did not so regard the situation as now depicted by respondents. The court of appeals made reference to the district court's post-judgment ruling, but did not characterize it or comment at all upon its intent or implications. The court of appeals did not in any way elucidate the "circumstances" or the precedents which prompted it to acknowledge but sidestep *Griggs*. That which respondents see in the district court's September 25 order, in petitioners' memorandum and in the court of appeals' opinion does not exist in plain print.

The petition for writ of certiorari should be granted and the contested portion of the court of appeals' judgment should be vacated.

MARSHALL, DENNEHEY, WARNER, COLEMAN & GOGGIN

By: _____

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